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In the Supreme Court of the United States

OCTOBER TERM, 1982

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,
PETITIONER

v.

SIERRA CLUB and ENVIRONMENTAL DEFENSE FUND

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Although they claim to have achieved various "public benefits" in the underlying merits litigation (see pages 12-20, *infra*), respondents do not dispute the fact that they were totally unsuccessful in their challenge to EPA's rulemaking. Nevertheless, respondents contend that the plain language of Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f), makes success, or even some tangible accomplishment, totally irrelevant to a court's decision to award attorneys' fees under that statute. But the literal language of the statute offers no answer to the question presented by this case. Instead, the Court must interpret the statute in light of its legislative history and with reference to the usual practices of Congress in this area, bearing in mind the principles of statutory construction that counsel against interpreting statutes in a manner that imposes monetary liability on the United States in the absence of clear and unambiguous congressional intent. When all of these factors are taken into account, it is clear that the award of attorneys' fees in this case cannot stand.

1. Respondents argue (EDF Br. 10-11; S.C. Br. 13-18[1]) that the plain language of Section 307(f) precludes a court from requiring any element of success or accomplishment as a prerequisite to an attorneys' fee award because such a prerequisite is not expressly mentioned. Relying on dictionary definitions, EDF argues that the term "appropriate" should be read to permit the courts to award attorneys' fees as they deem "suitable, proper or fitting" (EDF Br. 11). This argument proves too much, however, for even EDF acknowledges that there are limits to the courts' discretion to award attorneys' fees under Section 307(f) and that such awards are therefore reviewable under an abuse of discretion standard (*ibid.*).[2]

a. As we stated in our opening brief (at 13-14), the backdrop of the traditional American rule against fee-shifting counsels against an interpretation of Section 307(f) that would authorize attorneys' fee awards for totally unsuccessful litigants. In his dissenting opinion in *Alabama Power*

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[1]The Brief for Respondent Environmental Defense Fund will be cited as "EDF Br." and that filed by the Sierra Club will be cited as "S.C. Br."

[2]Section 307(f) authorizes a court to award attorneys' fees "whenever *it determines* that such award is appropriate" (emphasis added). Read literally, the statute would leave fee awards to the unreviewable and unlimited discretion of the court. For example, fees could be awarded to unsuccessful defendants or respondents, as well as to unsuccessful plaintiffs or petitioners, depending upon the court's personal beliefs as to the significance of the interests represented by the opposing parties. As Judge Wilkey noted in his dissenting opinion in *Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 19-24 (D.C. Cir. 1982), petition for rehearing pending, No. 78-1006, such a reading of "appropriate" raises serious constitutional problems because, as interpreted by respondents and the court of appeals, Congress has failed to provide the courts with any ascertainable standards for determining the "appropriateness" of a fee award in a particular case. Thus, even though Congress has provided statutory authorization for fee awards, that authorization would still embroil the courts in the same policymaking exercise of "pick[ing] and choos[ing] among plaintiffs * * * depending on the court's assessment of the importance of the public policies involved in particular cases"

Co. v. *Gorsuch*, 672 F.2d 1, 17 (D.C. Cir. 1982), petition for rehearing pending, No. 78-1006 (footnotes omitted), Judge Wilkey made the same point:

> The trouble with the [court of appeals' decision in this case] is that it would dramatically alter the award structure. In the absence of some evidence that Congress intended a dramatic departure, we should not adopt such a construction. Were such an expensive and unprecedented result contemplated, it surely would have been mentioned. Yet in none of the myriad House and Senate reports, committee prints, and floor debates cited in this opinion were more than a few lines ever devoted to these [attorneys' fee] sections at all, let alone any mention made of such a change. * * * If Congress meant for "appropriate" to mean that all non-frivolous plaintiffs would recover, it surely would have said so. * * *

Notwithstanding the court of appeals' dramatic departure from all previously-accepted notions of fee-shifting, EDF argues (at 27-34) that the rule requiring strict construction in the government's favor of statutes waiving sovereign immunity is inapplicable here. It does so by neatly categorizing some of this Court's sovereign immunity cases into groups that do not encompass the present case and then asserting that there are no other situations in which the rule of strict construction operates (*id.* at 28).

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that the Court found objectionable in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 269 (1975). In our view, however, it is not necessary to reach the constitutional problems posed by Judge Wilkey so long as "appropriate" is interpreted, as we urge, to encompass an element of tangible accomplishment, even if a favorable judgment on the merits is not required. This is a standard readily evaluated by the courts and thus capable of consistent application. In keeping with this Court's policy of avoiding unnecessary constitutional decisions, see, *e.g.*, *National Cable Television Association* v. *United States*, 415 U.S. 336, 342 (1974), our definition of "appropriate" should prevail over respondents' and the court of appeals' standardless and amorphous formulation.

Contrary to EDF's argument, the government has not invented any new doctrine of sovereign immunity in this case. The question is straightforward: what is the scope of the waiver Congress intended when it enacted Section 307(f)? Clearly, Congress intended that the government would be liable for fees in some circumstances. But, as noted by Judge Wilkey, it did not address the question presented by this case, viz., whether the government should subsidize totally unsuccessful litigants. In principle, the question here is no different from that presented in *United States* v. *Testan*, 424 U.S. 392, 405-407 (1976), in which the Court noted that in the Back Pay Act Congress had expressly authorized a monetary cause of action for federal employees "subjected to a reduction in their duly appointed emoluments or position" (*id.* at 407), but that the Act did not create a damages remedy for one who had not yet been appointed to the position he sought. Here, too, it is clear that Congress has provided a monetary remedy in the form of attorneys' fees for certain classes of plaintiffs, *i.e.*, those who prevail or accomplish something concrete short of judgment, but there is no evidence whatsoever to support the notion that Congress has provided a "remedy" for totally unsuccessful litigants. In deciding this case, therefore, the Court must be guided by the familiar principles of sovereign immunity just as it was in *Testan*. See, *e.g.*, *Pine Hill Coal Co.* v. *United States*, 259 U.S. 191, 196 (1922) ("A liability in any case is not to be imposed upon a government without clear words * * * and where, as here, the liability would mount to great sums, only the plainest language could warrant a court in taking it to be imposed"); *United States* v. *Zazove*, 334 U.S. 602, 616-617 & n.24 (1948) (same).[3]

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[3]EDF also argues (at 29-30) that the rules governing construction of waivers of sovereign immunity do not apply to substantive questions, such as the meaning of "appropriate" in this case, but are instead limited to "procedural" questions. This Court has never drawn such a distinction. Even if it had, however, it is fairly arguable that attorneys' fees are

b. A fair reading of the legislative history underlying development of the term "appropriate" does not support an interpretation of Section 307(f) that authorizes fee awards to losing litigants. Instead, "appropriate," which Congress first adopted in 1970 as a standard in Section 304(d) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7604(d) (see Pet. Br. 15-17), was chosen as a term of art to encompass two very different classes of parties that Congress intended to make eligible for attorneys' fees. The first group included successful defendants subjected to "frivolous or harassing" litigation. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 38 (1970). The second group included plaintiffs bringing "legitimate actions," a category that Congress meant to *extend* to those whose suits "result in successful [pollution] abatement but do not reach a verdict" (*ibid.*). This scheme encouraged proper use of the Clean Air Act's citizen suit provision (Section 304, 42 U.S.C. (Supp. IV) 7604) by subsidizing meritorious suits and penalizing clearly unreasonable ones.

Notwithstanding Congress' clear explanation of the twin circumstances in which an attorneys' fee award would be "appropriate," respondents contend that a single sentence from the section-by-section analysis contained in the Senate Report evidences Congress' true intent in 1970. That sentence provided that attorneys' fee awards would be authorized "without regard to the outcome of the litigation" (S. Rep. No. 91-1196, *supra*, at 65). If read literally, as respondents urge, this statement is clearly at war with the carefully limited circumstances that the Senate Report itself described as proper for fee awards. The statement is reconcilable with the body of the Senate Report only if one remembers that, in 1970, the "outcome of the litigation" referred to the final judgment (see Pet. Br. 20-21 & n.13). If abatement of a violation was achieved prior to judgment, the suit would be dismissed as moot. See, *e.g.*, *Delaware*

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a "procedural" matter because they are collateral to the main action. See *White* v. *New Hampshire Department of Employment Security*, 455 U.S. 445, 451 (1982).

Citizens for Clean Air, Inc. v. *Stauffer Chemical Co.*, 367 F.Supp. 1040 (D. Del. 1973); cf. *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802 (D.C. Cir. 1981). Even respondents acknowledge (EDF Br. 16) that it was not until 1980 that this Court held that a party could "prevail" by way of settlement rather than litigated judgment. *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980). Thus, as we stated in our opening brief (at 21), the 1970 legislative history supports the view that Congress intended to discard a favorable final judgment as a prerequisite to an award of attorneys' fees; it does not, however, suggest that Congress intended to authorize fee awards to litigants who did not achieve *any* measure of tangible success.

Respondents assert (EDF Br. 19; S.C. Br. 22-24) that even if Congress so limited the meaning of "appropriate" in 1970, it intended to expand the meaning of the same word in 1977, when it enacted Section 307(f). Respondents completely gloss over Congress' clearly expressed intention to conform Section 307 to Section 304 (see Pet. Br. 15-17).[4] The Sierra Club asserts that in actions to review EPA regulations brought under Section 307 there would be no occasion for "abatement of pollution" prior to judgment because EPA is not a polluter (S.C. Br. 24-25). This surely is mere quibbling. Achievement of the desired result prior to judgment, equivalent to abatement of pollution, is certainly possible and, indeed, fairly common in Section 307 actions. EPA may withdraw regulations or modify its orders after a

[4]Respondents also ignore the fact that another 1977 amendment to the Clean Air Act reinforces Congress' intent to retain its original, 1970 formulation of the circumstances in which attorneys' fee awards would be appropriate. In addition to providing for fees in Section 307(f), Congress also amended Section 113(b), 42 U.S.C. (Supp. IV) 7413(b), to provide that defendants in federal enforcement actions are eligible for fee awards whenever the government's enforcement actions are "unreasonable." The original structure for attorneys' fee awards was thus preserved in the 1977 Amendments: Plaintiffs could be awarded fees if they achieved some tangible benefit, even if short of judgment, that served the purposes of the Clean Air Act, while defendants could obtain fees if they were subjected to "unreasonable" actions, whether initiated by private plaintiffs or by EPA.

Section 307 action is initiated (see, *e.g.*, *EPA* v. *Brown*, 431U.S. 99 (1977); *Carolina Power & Light Co.* v. *EPA*, No. 79-1741 (4th Cir. Nov. 30, 1980); *Community Action Research Group* v. *Camin*, No. 79-1940 (8th Cir. Mar. 12, 1983)), or it may settle the litigation (see, *e.g.*, *Chemical Manufacturers Association* v. *EPA*, No. 79-1112 (D.C. Cir.)). In these situations, the petitioner "succeeds" in its suit in the sense of achieving the desired result, even though the official disposition on the court dockets may be dismissal of the petition for review. Cf. *EPA* v. *Brown*, *supra*, 431 U.S. at 104.

Respondents also claim (S.C. Br. 21; see also EDF Br. 17-18) that the 1977 House Report's endorsement of *NRDC* v. *EPA*, 484 F.2d 1331 (1st Cir. 1973), shows that Congress intended to expand eligibility for attorneys' fees to unsuccessful litigants whose challenges were "constructive and reasonable." We have dealt at length with the First Circuit's decision (Pet. Br. 26-28). We note here only that the First Circuit awarded attorneys' fees to NRDC because NRDC *succeeded* in substantial part (*i.e.*, it brought a "legitimate action"), and furthered the public interest in proper implementation of the Clean Air Act in so doing.[5] Thus, the First Circuit's decision represents a direct application of the standards for attorneys' fees articulated by Congress in 1970. See S. Rep. No. 91-1196, *supra*, at 38.

Finally, respondents claim that Congress evidenced an intent not to "limit" attorneys' fees to successful parties by rejecting a proposal that fees be awarded automatically to a

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[5]The court also reasoned that if NRDC's challenge had been "wholly or in substantial part frivolous," EPA, not NRDC, should be awarded attorneys' fees (484 F.2d at 1338). Under this standard, it is at least arguable that EPA, not Sierra Club, would be entitled to an award of attorneys' fees for the underlying litigation in this case. In *Sierra Club* v. *Costle*, 657 F.2d 298, 318-322 (D.C. Cir. 1981), the court quickly disposed of Sierra Club's arguments concerning the proper interpretation of Section 111 of the Clean Air Act, 42 U.S.C. (Supp. IV) 7411. During the course of its discussion, the court confessed that it was "frankly at a loss to understand" Sierra Club's arguments (657 F.2d at 320). The court found the text of the statute "relatively clear" and held that Sierra Club's contrary interpretation was not "warranted by a fair reading of the Act or the underlying legislative history" (*id.* at 321).

"prevailing party" (S.C. Br. 20; EDF Br. 19-20). The Senate proposal, contained in S. 252, 95th Cong., 1st Sess. (1977), however, would not have created a limitation on the pre-existing standards for attorneys' fees. To the contrary, it would have expanded substantially the government's liability for attorneys' fees. Gone, for example, would have been the requirement that the litigation be in the public interest, *i.e.*, assist in the proper implementation of the Clean Air Act. Instead, even if a party prevailed, but frustrated the goals of the Clean Air Act, an award of attorneys' fees would have been mandated. Polluter defendants who prevailed would have been granted fees no matter how technical their victory or how substantial the enforcement proceeding.

The Senate Staff Report discussing this proposal, upon which respondents rely, was directed at the automatic character of the attorneys' fee awards, not at the requirement of success or accomplishment in the litigation. The staff wrote (Staff of Senate Comm. on Environment and Public Works, 95th Cong., 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1977*, at 37 (Comm. Print 1979)):

> Is there any need to modify the existing judicial practice of awarding fees based on the individual circumstances of each case?

The clear import of this passage is that each case must be studied to determine whether it furthered the goals of the Clean Air Act, not that totally unsuccessful litigants may be granted fees.[6]

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[6]EDF suggests (at 12, 23-24 n.35) that Congress' use of other standards for awards of attorneys' fees in other statutes and in different sections of the Clean Air Act itself means that the "appropriate" standard must be interpreted to authorize fees for totally unsuccessful parties. But the fee provisions cited by EDF are part of make-whole remedies for individuals personally injured by statutory violations. For example, employee protection provisions in numerous statutes authorize the Secretary of Labor to include an award of fees and expenses in a reinstatement order directed to an employer found guilty of discrimination against an employee for cooperating in the enforcement of various

The report's reference to "the existing judicial practice" does not alter this analysis. At the time the report was written, there were only three decided cases interpreting the "appropriate" standard, and it is clear that those cases cannot support fee awards to parties who do no more than air losing claims. One of the three cases, *NRDC* v. *EPA*, *supra*, 484 F.2d at 1331, has already been adequately discussed. The other two cases are *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.*, 62 F.R.D. 353 (D.Del. 1974), aff'd, 510 F.2d 969 (3d Cir. 1975) (table), and *Citizens Association of Georgetown* v. *Washington*, 383 F.Supp. 136 (D.D.C. 1974), rev'd on other grounds, 535 F.2d 1318 (D.C. Cir. 1976).

In *Delaware Citizens*, an admitted violation of the Clean Air Act was abated after the filing of suit when the defendant obtained a variance from the otherwise applicable pollution control requirements. Nevertheless, because it found that plaintiff's suit had not altered the defendant's conduct nor "in any other tangible or direct way contributed to achievement of the objectives of the Clean Air Act," 62 F.R.D. at 355, the court *rejected* plaintiff's request for fees. Although the court observed in dicta that "ultimate success" in a citizen's suit under Section 304 might not be a

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statutes. See, *e.g.*, Clean Air Act, 42 U.S.C. (Supp. IV) 7622(b)(2)(B); Toxic Substances Control Act, 15 U.S.C. 2622(b)(2)(B); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. V) 1293(c); Clean Water Act, 33 U.S.C. 1367(c); Safe Drinking Water Act, 42 U.S.C. 300j-9(i)(2)(B)(ii); Energy Reorganization Act of 1974, 42 U.S.C. (Supp. IV) 5851(b)(2)(B); Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6971(c). In two other statutes cited by EDF, Congress authorized private damages actions for persons injured in body or property by operators acting in violation of the statutes; attorneys' fees and expenses are included in the definition of damages that may be awarded in such actions. See Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. V) 1270(f); Outer Continental Shelf Lands Act, 43 U.S.C. (Supp. IV) 1349(b)(2).

That Congress included attorneys' fees and expenses as part of make-whole remedies in provisions dealing with the adjustment of private rights sheds little light on its intent with respect to standards for the award of attorneys' fees in those situations in which the object is to promote the public interest in proper implementation of the Clean Air Act.

prerequisite to an attorneys' fee award (62 F.R.D. at 355), the court also stated that fee awards to a losing party should be reserved for those cases in which the litigation "serves the objectives of the Act in some substantial way or in which other exceptional circumstances tip the balance of the equities decidedly in the losing party's favor" (*ibid.*). This hardly constitutes an endorsement of fee awards to parties whose "contribution" to the goals of the statute was an unnecessary validation of the agency's actions. Indeed, elsewhere in the opinion the court questioned whether fees would be "appropriate" when, as here, state and federal pollution control agencies are already actively engaged in fulfilling their statutory duties (*id.* at 357).

The decision in *Citizens Association* is of no precedential value in light of the court of appeals' reversal (535 F.2d 1318 (D.C. Cir. 1976)). But even the district court's reasoning on the merits shows that plaintiffs in that case accomplished more than the airing of novel issues. The court made it clear that plaintiffs lost their case to enjoin construction of two buildings primarily because the District of Columbia government had failed to enact the regulatory framework contemplated by the Clean Air Act (383 F.Supp. at 145). The court thus saw the suit as a helpful and necessary effort to galvanize the District to action (*id.* at 145-146). On appeal, the court of appeals vacated the award of attorneys' fees upon finding that Section 304 of the Clean Air Act did not provide the district court with jurisdiction to remedy the District of Columbia's failure to implement the Act (535 F.2d at 1322-1323). Thus, the district court in *Citizens Association* had overstepped its authority to award fees because of its concern for conduct thought to be impeding proper implementation of the Clean Air Act. By contrast, the court of appeals in the present case found that EPA had already acted properly.

The "existing judicial practice" cited by the Senate Staff, therefore, consisted only of fee awards to partially prevailing parties whose losing contentions were not frivolous or harassing, *NRDC* v. *EPA*, *supra*, 484 F.2d at 1338-1339. Accordingly, there is no reason to read into the affirmation

of "the existing judicial practice" a congressional intent to authorize attorneys' fee awards to totally unsuccessful parties.

2. Respondents also argue that the result below is consistent with that reached by "[e]very federal court to consider the issue" (EDF Br. 22; see also S.C. Br. 27-28). Respondents are building upon a strawman because nearly every case has been decided by the District of Columbia Circuit. Even more to the point, however, the District of Columbia Circuit itself has not awarded fees to totally unsuccessful litigants in any case but the present. In *Alabama Power Co.* v. *Gorsuch, supra*, and *Environmental Defense Fund* v. *EPA*, 672 F.2d 42 (D.C. Cir. 1982), petition for rehearing pending, No. 79-1580, both decided the same day as the instant case, the petitioners were largely successful. Thus, language in those opinions concerning fee awards to non-prevailing parties is merely dicta. In *Village of Kaktovik* v. *Watt*, 689 F.2d 222 (D.C. Cir. 1982), the court acknowledged, as it had to under controlling circuit precedent, that "success" was not required for a fee award, but it then declined to award any fees upon finding that plaintiffs' contribution to the goals of the statutes at issue in that litigation did not merit compensation; again, therefore, the court's observations about awards to losing parties were dicta. Finally, in *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802 (D.C. Cir. 1981), it was at least arguable that plaintiffs accomplished something. At the time plaintiffs filed suit in that case, and for three years thereafter, the District of Columbia was in clear violation of its implementation plan under the Clean Air Act. Plaintiffs never obtained a favorable final judgment, however, because the District modified the plan, and EPA approved the revision, in such a way as to render the case moot. This anomalous situation, in which plaintiffs lost their case only because of an intervening change in the law, hardly qualifies as support for the decision below. Moreover, as the court noted in awarding fees (639 F.2d at 804), even an "unsuccessful" suit

in such circumstances may produce a tangible accomplishment by displaying to the public a record of inaction or action delayed on the part of responsible government agencies. Respondents here cannot claim even this limited contribution to the public interest.[7]

3.a. Despite their total lack of success on the merits of the underlying litigation, the court of appeals held that respondents were entitled to attorneys' fees because their litigation substantially contributed to the achievement of two goals of the Clean Air Act: "prompt resolution of serious questions of statutory interpretation and citizen participation in monitoring administration of the Act through enforcement suits" (Pet. App. 18a). The court of appeals offered no support for its assertion that these objectives are goals of the statute; EDF, however, attempts to bolster the court's opinion by arguing (at 35-36) that the language of the statute and its legislative history support the court's conclusion. In the context of this case, EDF's arguments are erroneous.

EDF cites (at 36) those portions of the Act providing strict time limits on judicial challenges to EPA regulations for the proposition that "prompt resolution of serious questions of statutory interpretation" is an express goal of the statute justifying attorneys' fee awards. But, as we pointed out in our opening brief (at 31-32 n.20), Congress provided "prompt" judicial review provisions not for the sake of encouraging fee-generating litigation but rather in recognition of the inescapable fact that judicial challenges to EPA regulations were inevitable and that, absent complete preclusion of review, the best Congress could do to maintain the Act's strict compliance deadlines was to limit judicial review in time and place. The legislative history of the Clean Air Act makes Congress' purpose clear (see H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 322 (1977); S. Rep. No. 91-

[7]One other court of appeals has awarded fees to losing plaintiffs, relying on *Metropolitan Washington, supra. Northern Plains Resource Council* v. *EPA*, 670 F.2d 847 (9th Cir. 1982). The government has not yet decided whether to seek rehearing or review by this Court in that case.

1196, *supra*, at 40-41). Thus, far from evincing an intent to encourage judicial challenges, the statutory structure and legislative history show an intent to minimize the interference with achievement of the Act's substantive goals that would necessarily be occasioned by unrestrained judicial review; it is impossible to understand how EDF can transform this congressional purpose into a desire for the payment of attorneys' fees to unsuccessful litigants.

EDF also argues (at 35-36) that citizen participation is an express goal of the Act. But the statutory provisions it cites all relate to citizen participation in agency *rulemakings*; EDF does not cite any statutory provision (nor are we aware of any) that seeks to *encourage* citizen-initiated litigation once the rulemaking proceedings have been concluded. As we noted in our opening brief (at 35-36 & nn.23-24), citizen participation in agency rulemakings can inure to the benefit of the public by leading to better informed decisionmaking, whether or not the citizens' views are ultimately adopted. Comparable benefits are not reaped, however, by citizen participation in judicial review, and thus Congress has consistently differentiated between participation before the agency and in the courts (see *ibid.*; see also *Pacific Legal Foundation* v. *Goyan*, 664 F.2d 1221, 1225 (4th Cir. 1981)). Contrary to EDF's argument (at 36), therefore, one cannot fairly transmute Congress' solicitude for public participation in the rulemaking process into a congressional mandate for the federally-subsidized presentation of nonmeritorious legal positions in court.

b. The Sierra Club does not point to any specific "public benefits" conferred by its litigation efforts, relying instead on the court of appeals' assertion that "prompt resolution of the important and complex issues" (Pet. App. 8a) involved in this case is sufficient to justify an award of attorneys' fees (S.C. Br. 29).[8] We have already demonstrated that Congress

[8]Notably, the Sierra Club has abandoned the contention advanced in its Brief in Opposition (at 2) that it aided agency implementation of the Clean Air Act "by instructing EPA on a better (albeit not mandatory) way to conduct rule-makings * * *." The contention was dropped, no

did not intend to award fees for this purpose (see pages 12-13, *supra*), and thus we need not further discuss the Sierra Club's argument. EDF, on the other hand, contends (at 34-49) that its litigation advanced the goals of the Clean Air Act in four specific ways. As we demonstrate below, it is clear that none of these purported "public benefits" is sufficient, either alone or in combination, to justify the court of appeals' award of attorneys' fees in this case.

(1) EDF claims that its unsuccessful challenge to EPA's procedures in this rulemaking "clarified" the applicable law to be followed in future rulemakings (EDF Br. 38-43).[9] But such "clarification" is in any event the normal result of all litigation.[10] Clarification of the governing law serves a purpose when it results in the correction of an agency error or mistake, as was true in three of the cases cited by EDF (at 41-42) (*Halperin* v. *Department of State*, 565 F.2d 699 (D.C. Cir. 1977); *NRDC* v. *EPA*, 484 F.2d 1331 (1st Cir. 1973); *Save Our Sound Fisheries Ass'n* v. *Callaway*, 429

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doubt, because there is not the slightest evidence that Congress intended to award attorneys' fees to anyone undertaking such admittedly superfluous instruction. Similarly, EDF no longer argues, as it did in its Brief in Opposition (at 15), that fees may be awarded to a totally unsuccessful litigant so long as the underlying lawsuit was "constructive and reasonable."

[9]EDF's claim (at 39) that it not only "clarified" the law but actually triumphed over EPA in connection with the handling of interagency communications is puzzling. EDF asserts (*ibid.*) that the court "indicat[ed] that [such communications] are included by the Act in the record for judicial review." To the contrary, the court stated that "[t]hese materials, although docketed, are *excluded* from the 'record for judicial review' " (657 F.2d at 404 n.519; emphasis added).

[10]EDF asserts (at 42-43 & n.48) that courts frequently award fees to litigants who, even though unsuccessful in their own behalf, "succeed" in clarifying ambiguous trust documents or the law governing such documents. EDF further contends (*ibid.*) that this rule justifies the fee award here. But the rule upon which EDF relies permits attorneys' fees and expenses to be paid from a trust fund or estate when the litigation is reasonably necessary to interpret the governing instrument and ensure proper administration of the fund. See, *e.g.*, *Union Central Life Ins. Co.* v. *Hamilton Steel Products, Inc.*, 493 F.2d 76, 79 (7th Cir. 1974); *Orme* v. *Northern Trust Co.*, 25 Ill. 2d 151, 183 N.E.2d 505 (1962). In the

F.Supp. 1136 (D.R.I. 1977)). But when, as here, the agency has not misstepped, such " clarification" does nothing more than promote the mere "refinement of jurisprudential understanding," *Valley Forge Christian College* v. *Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982), a point made all the more apparent by EDF's assertion that this litigation was valuable because it provided fodder for a symposium on informal rulemaking (EDF Br. 40-41).

(2) EDF relies heavily on the disclosure of "Important Ex Parte Communications" (EDF Br. 43) as conferring a public benefit sufficient to justify the award of attorneys' fees. A review of the proceedings concerning these "disclosures" is necessary to put this claim in perspective. After the close of the formal comment period on the rulemaking, EPA officials orally discussed the pending NSPS proposal in meetings with the President and other representatives of the Executive Branch, members of the Legislative Branch and outside interest groups, including EDF (see *Sierra Club* v. *Costle*, 657 F.2d 298, 387-389 (D.C. Cir. 1981)). Of nine identified meetings, seven were summarized and noted in the rulemaking docket (see, *e.g.*, J.A. 17). The remaining two—a briefing for Senate staff persons and a meeting with the President—were not entered in the rulemaking docket. EDF filed a motion for leave to depose certain EPA officials, or to serve interrogatories, to obtain "descriptions of

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present situation, of course, there is no trust fund or estate from which fees may be awarded. Instead, EDF was awarded fees against its opponent, the federal government. But, under EDF's theory, the government also should have been awarded fees for its participation as a necessary party in the litigation. Such a result, which obviously was not intended by EDF, only points out the correctness of this Court's observation that the "common fund" exception to the American rule against fee-shifting is not suited for use in the context of judicial review of agency action. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 264-265 n.39 (1975).

the conversations and meetings, particularly by non-EPA participants" (J.A. 14). A motions panel of the court of appeals referred the request for discovery to the merits panel (J.A. 24), which ultimately denied the requested discovery upon finding it neither "necessary nor appropriate" (*Sierra Club* v. *Costle, supra*, 657 F.2d at 390 n.450). The motions panel, however, had ordered EPA to submit affidavits concerning some of the meetings; the only information required to be set forth in the affidavits was the identity of the meeting participants, a description of how the meetings came to be held, and the approximate length of each meeting (J.A. 25). These affidavits are apparently the "important disclosures of information" (EDF Br. 45) that justify an attorneys' fee award. An examination of even one such affidavit reveals how feeble is this claim. Omitting the purely formal parts of the affidavit, the affidavit describing the meeting with the President provided, in its entirety, as follows (J.A. 28):

> On April 30, 1979, EPA officials briefed the President and Executive Branch officials on the issues and options presented by the rulemaking. The briefing was held on EPA's initiative, as part of the Agency's policy of briefing the Executive Branch on major EPA actions. It lasted about one hour. It was attended by the following persons: President Carter; James Schlesinger, Secretary of Energy; Charles Schultze, Chairman of the Council of Economic Advisors; Charles Warren, Chairman of the Council on Environmental Quality; Alfred Kahn of the White House Staff; Stu Eizenstat, Advisor to the President for Domestic Policy; Kitty Schirmer and perhaps Simon Lazarus of the President's Domestic Policy Staff; Jim McIntyre and Elliot Cutler of the Office of Management and Budget; Douglas Costle, EPA Administrator; myself; and other employees of the offices of the above persons, whose names I do not recall.

It is simply not credible to claim, as EDF does (at 44-45), that this affidavit and others like it constitute "important disclosures of information" sufficient to justify an award of attorneys' fees.[11] In addition to the fact that the affidavits contain virtually no information whatsoever, let alone "important" information, most of the meetings had already been disclosed in the rulemaking docket (*Sierra Club* v. *Costle, supra*, 657 F.2d at 404; see also *id.* at 387-389 & nn.429, 433-437, 439-440, 443-445, 448-449), and thus the affidavits disclosed little if anything new. And the court of appeals ruled that the two undocketed meetings were not of the type that had to be disclosed in the rulemaking docket in any event (*id.* at 404-408). There is no logic in awarding attorneys' fees for the "public service" of exposing information that the agency was under no obligation to disclose. To

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[11]EDF argues (at 44-45) that other courts have awarded fees to parties who did not ultimately prevail on the merits of their claims but did expose to the public and the court important information. The cases cited are all distinguishable in that the information disclosed had some intrinsic importance. For example, in both *Metropolitan Washington Coalition for Clean Air, supra*, 639 F.2d at 804, and *Citizens Association for Georgetown, supra*, 383 F.Supp. at 145, the courts found that the unsuccessful suits could have demonstrated to the public "a record of inaction and action delayed on the part of the District of Columbia government in implementing the Clean Air Act." In *Kopet* v. *Esquire Realty Co.*, 523 F.2d 1005, 1007-1009 (2d Cir. 1975), the lawsuit resulted in the disclosure of financial statements that revealed, for the first time, that certain members of a partnership had been "borrowing" from the partnership; as a result of these and other revelations, limited partners were able to bring suit in state court alleging breaches of common law and statutory fiduciary duties. Finally, in *Sierra Club* v. *Lynn*, 364 F.Supp. 834, 850 (W.D. Tex. 1973), rev'd in part, 502 F.2d 43 (5th Cir. 1974), the district court found that plaintiffs' lawsuit "forc[ed] both the government and [the private developer] to do what they should have done of their own initiative in the first place * * *." Thus, plaintiffs were awarded fees not for the mere disclosure of information but for serving as a catalyst for the government's compliance with the relevant statutory mandates. In any event, the award of attorneys' fees in *Sierra Club* v. *Lynn*, which was decided before this Court's ruling in *Alyeska Pipeline Service Co., supra*, is clearly not good law because the court awarded fees on the basis of the "private attorney general" theory rejected in *Alyeska*. Anticipating this Court's ruling in *Alyeska*, the Fifth Circuit reversed the attorneys' fee award, noting in addition that it had "never assessed attorneys' fees against a party innocent of any wrongdoing" (502 F.2d at 65-66; footnote omitted).

be sure, disclosure of the information may have been necessary to litigate EDF's claims, but that fact alone is clearly insufficient to convert the disclosures into "public benefits" for which the government should be assessed fees.

(3) EDF also claims (at 45-47), as did the court of appeals (Pet. App. 18a-19a), that fees were justified because EDF's participation in this case provided "balanced representation" by environmental interests to offset the positions advocated by the industry representatives that participated in the litigation. In attempting to justify a fee award on this basis, both EDF and the court of appeals betray a serious misperception of the proper role of courts in reviewing agency rulemakings. In judicial review proceedings, courts may not substitute their judgment for that of the agency on the balance to be struck between competing policy considerations relevant to the rulemaking. See, *e.g.*, *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 555 (1978). Instead, the court's function is to ensure that the agency has complied with the substantive and procedural requirements of the governing statutes and the Constitution. *Id.* at 558. Whether EPA gave appropriate consideration to the various factors identified in Section 111 of the Clean Air Act, 42 U.S.C. (Supp. IV) 7411, is to be determined by a review of the agency's rulemaking record, and not by the post-hoc arguments of competing interest groups participating in judicial review. Only if it were the function of the court to second-guess EPA's policy decisions would it be necessary for the court to encourage the participation of a variety of different interest groups. Of course, that is not the proper role of the judiciary.

(4) Finally, EDF claims (at 47-49) that the government benefitted from its challenge because the resulting court opinion provided "important guidance to the executive branch concerning proper informal rulemaking procedures" (*id.* at 49) [12] In support of this contention, EDF relies on the

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[12]EDF has retreated somewhat from its bold claim (EDF Br. in Opp. 3) that the decision in this case caused the Office of Management and Budget to "alter" procedures for rulemaking throughout the entire

so-called "Stockman Memorandum" (J.A. 30-31), which outlines the roles of the Presidential Task Force on Regulatory Relief and the Office of Management and Budget in agency rulemakings. The text of the Stockman Memorandum belies EDF's exaggerated claims for it. The Memorandum states that "[i]n accordance with advice provided by the Department of Justice * * *," certain procedures would be followed in providing factual material for agency rulemakings (J.A. 31). The Memorandum then notes as an "additional" matter that the procedures "will be consistent with the holding" of *Sierra Club* v. *Costle, supra*, 657 F.2d at 298. There is good reason for this consistency, because both OMB and the court of appeals relied on the same opinion issued by the Justice Department's Office of Legal Counsel. See Memorandum Opinion for the Secretary of the Interior, No. 79-5, 3 Op. Off. Legal Counsel 21 (1979); *Sierra Club* v. *Costle, supra*, 657 F.2d at 405 n.520.[13] Thus, far from providing the entire Executive Branch with guidance for handling ex parte contacts in future rulemakings, EDF did no more than induce the court of appeals to endorse the government's own in-house legal advice that predated the merits decision in this case. An attorneys' fee award premised on the "benefits" of the Stockman Memorandum, therefore, is tantamount to charging the government for the privilege of having a court cite with approval the Justice Department's own legal opinions.

Executive Branch, an assertion for which there was no support whatsoever. The court of appeals made much more modest claims for its decision, stating that the opinion had "apparently provided fuel for discussion about appropriate restrictions on *ex parte* comments in other administrative proceedings" (Pet. App. 18a). As we show above, even the court of appeals' assessment is overstated.

[13]We are advised by OMB that the Stockman Memorandum's mention of "advice provided by the Department of Justice" referred only to the above-cited Office of Legal Counsel opinion, and not to any advice given as a result of the court of appeals' decision in this case.

In short, the purported "public benefits" conferred by this litigation are wholly illusory and certainly do not rise to the level of meaningful public contributions that Congress intended to subsidize. Accordingly, the court of appeals' fee award based on these "benefits" was an abuse of discretion.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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